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In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID DAWSON, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Constitution bars a State from introducing, in a capital sentencing proceeding, evidence concerning the defendant's association with a white racist prison gang.

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INTEREST OF THE UNITED STATES

The issue in this case is important to the administration of criminal justice in the federal system because it concerns the extent to which evidence of a defendant's character may be introduced at a sentencing proceeding. In imposing sentences under the Sentencing Guidelines, Congress has directed federal courts to consider "the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1), and has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," 18 U.S.C. 3661.

Even if the issue is confined to capital sentencing proceedings, the federal government has an interest in the resolution of the issue presented here because of its ap-

plication to federal capital cases. For example, federal law authorizes the death penalty for intentional killings connected to a continuing criminal enterprise. 21 U.S.C. 848(e). For certain kinds of homicides, the death penalty may be imposed if the sentencing authority finds one or more statutory aggravating circumstances to be present. 21 U.S.C. 848(k). In addition, information may be presented as to any other aggravating factor for which notice has been provided. 21 U.S.C. 848(j). The statute thus authorizes the government to introduce evidence concerning the defendant's character and likely future behavior to assist the jury in determining whether to recommend the death penalty for a defendant who qualifies for that penalty under the statute. The Court's resolution of the question presented here will affect the administration of that provision of federal law and similar provisions in legislation that may be enacted in the future.[1]

STATEMENT

Following a jury trial, petitioner was convicted on four counts of first degree murder, six counts of possession of a deadly weapon during the commission of a felony, and one count each of first degree burglary, second degree burglary, robbery, theft, and possession of a deadly weapon by a prohibited person. He was sentenced to death on the murder convictions and imprisonment for a total of 100 years on the other convictions. The Delaware Supreme Court affirmed. J.A. 135-209.

1. Shortly after midnight on December 1, 1986, petitioner and three other inmates escaped from the Dela-

[1] Recent legislative efforts demonstrate a continuing interest in the use of non-statutory aggravating evidence in capital sentencing proceedings. See S. 635, 102d Cong., 1st Sess. §§ 3592-3593, 137 Cong. Rec. S3195-S3196 (daily ed. Mar. 13, 1991) (providing for the admission of non-statutory aggravating evidence at a sentencing hearing in federal death penalty cases); S. 1241, 102d Cong., 1st Sess. §§ 3592-3593, 137 Cong. Rec. S9986-S9987 (daily ed. July 15, 1991) (same).

ware Correctional Center near Smyrna, Delaware. Petitioner stole a car and drove south; the other three inmates stole another car and headed north. Early that morning, petitioner burglarized a house near Kenton, Delaware, where he stole a motorcycle jacket, pocket watches, and loose change. J.A. 137-140.

Shortly thereafter, petitioner entered the home of Richard and Madeline Kisner, located about half a mile from the site of the burglary. Mrs. Kisner was alone in the house preparing to leave for work. Petitioner murdered Mrs. Kisner and stole the Kisners' car and some money. J.A. 140-142.

When the Kisners' son returned home from school that afternoon, he found his mother lying on a bed in a red house coat. She had been stabbed 12 times in the chest and had lacerations on her forehead. She had been gagged with a sock, and her hands had been tied behind her back with shoelaces. There were strangulation wounds on her neck. J.A. 141.

That evening, petitioner appeared at the Zoo Bar in Milford, Delaware, wearing a motorcycle jacket that did not fit him. Petitioner introduced himself to a woman in the bar and told her his name was "Abaddon," which he said meant "one of Satan's disciples." Petitioner subsequently was asked to leave the bar. At about 9:25 that evening the police found the Kisners' car parked near the bar. Petitioner's fingerprints were found inside the car. J.A. 142-143, 185.

About an hour later, a Delaware state trooper responded to a call to investigate a one-car accident. The car, which had been reported stolen from a location near the Zoo Bar, had been driven across the road and into a ditch. At about 5:25 the next morning, after a house-to-house search, petitioner was found hiding on the floor of an automobile about three-tenths of a mile from the scene of the accident. He was wearing the stolen motorcycle jacket and carrying four of the stolen pocket watches. He was also carrying a sock that matched the

one used to gag Mrs. Kisner. Red fibers on the motorcycle jacket and petitioner's shirt matched those of the victim's house coat. Bloodstains on petitioner's clothing matched the victim's blood type. J.A. 143-145.

2. Petitioner is a member of the Aryan Brotherhood, a "white supremacist Nazi oriented gang." J.A. 146. The Aryan Brotherhood "originated at the San Quentin Prison in California in response to perceived threats from racial minority gangs of inmates." *Ibid.* The trial court stated that the Aryan Brotherhood has a reputation for violence "against black and Latino prison gangs," and that "[i]ts apparent motto [is] [k]ill to get in and die to get out." *Id.* at 146-147 n.5. Petitioner has the words "Aryan Brotherhood" tattooed on his right hand. Petitioner also has several swastikas tattooed on his body. While awaiting trial, petitioner painted a swastika on the wall of his prison cell. *Id.* at 146-147.

Prior to trial, petitioner filed a motion *in limine* seeking to exclude all evidence relating to the Aryan Brotherhood. The State responded that it did not intend to introduce any such evidence at the guilt phase of the trial, but that it would offer the evidence at the penalty phase if petitioner were convicted. The trial court deferred ruling on the motion. J.A. 5, 147-149.

Following petitioner's conviction, the State gave notice that during the penalty phase of the trial it intended to introduce (1) expert testimony about the Aryan Brotherhood, (2) testimony that petitioner refers to himself as "Abaddon" (angel of hell) and has the name "Abaddon" tattooed in red letters across his stomach, and (3) photographs of petitioner's tattoos and the swastika he painted on the wall of his prison cell. Petitioner argued that this evidence was inflammatory and irrelevant, and that its admission would violate his rights under the First Amendment. J.A. 183-184.

After hearing the parties' arguments, the trial court observed that

> membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

J.A. 184. Following a recess, the parties agreed to the following stipulation, which was entered into evidence without further objection:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

Ibid.

In return for petitioner's agreement to the stipulation, the State agreed not to call an expert witness to testify about the Aryan Brotherhood. Petitioner's counsel told the trial court that the stipulation "should resolve that issue." J.A. 54. In addition to the stipulation, the State presented evidence of petitioner's lengthy criminal record, which included numerous juvenile offenses, 14 felony convictions, 24 conduct violations as an inmate, and 6 escapes. The woman who encountered petitioner in the Zoo Bar testified that he identified himself as "Abaddon," and said that the name means "one of Satan's disciples." Finally, a detective testified that the definition of "Abaddon" is "angel of the bottomless pit," and that petitioner has the word "Abaddon" tattooed across his stomach and the words "Aryan Brotherhood" tattooed on his right hand. The State submitted into evidence, without objection, photographs of petitioner's tattoos. J.A. 80-87, 145-146, 184-187.

Petitioner presented the testimony of two members of his family at the penalty hearing. They testified that petitioner had good relations with his family, that they

still loved him and would visit him in prison, and that petitioner had once offered to donate one of his kidneys to a relative. J.A. 88-95, 146. In addition, petitioner elicited testimony from one of the State's witnesses that since 1981 petitioner has participated in Alcoholics Anonymous and in the Green Tree Program, a program for the treatment of drug and alcohol abuse. *Id.* at 79.

During closing argument, the prosecutor commented that petitioner "[c]ould have joined the [Jaycees] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan Brother. What does that say about his character and propensities?" J.A. 105. In response, petitioner's counsel argued that the jury should give petitioner's membership in the Aryan Brotherhood and his use of the name Adabbon "absolutely no weight." *Id.* at 115. Petitioner's counsel argued that the jury "might find it personally distasteful that he is what the State says he is, but if he thinks it, if he believes it, but if he doesn't do anything about it, where is the harm?" *Id.* at 117. In rebuttal, the prosecutor argued to the jury that petitioner's membership in the Aryan Brotherhood and his use of the name Abaddon "reflects upon [petitioner's] character. It tells us something about him." *Id.* at 126.

The jury recommended that petitioner be sentenced to death, and the trial court imposed sentence in accordance with that recommendation. J.A. 133, 135-136.

3. The Delaware Supreme Court unanimously affirmed the convictions and the death sentence. J.A. 135-209. The court rejected petitioner's contention that the evidence concerning the Aryan Brotherhood and petitioner's use of the name "Abaddon" should not have been admitted at the penalty hearing. The court observed that the jury, having found three statutory aggravating factors that made petitioner eligible for the death penalty,[2] was "required to make an *individualized* determination of whether [petitioner] should be executed or incarcerated for life, based upon [petitioner's] character, his record and the circumstances of the crime." J.A. 189. In making that determination, the court explained, "it is desirable for the jury to have as much information before it as possible." *Id.* at 190. The court noted this Court's statement that "a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant' would violate the Constitution." *Ibid.* (quoting *Baldwin* v. *Alabama*, 472 U.S. 372, 382 (1985), quoting, in turn, *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983)). But the court observed that "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing * * * evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry." J.A. 190 (quoting *Commonwealth* v. *Abu-Jamal*, 521 Pa. 188, 215, 555 A.2d 846, 859 (1989), cert. denied, 111 S. Ct. 215 (1990)). Moreover, the court noted, the sentence should reflect "a reasoned moral response to the defendant's background [and] character." J.A. 190 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

The court concluded that because the evidence relating to the Aryan Brotherhood and the name Abaddon was relevant to a proper purpose of the sentencing proceeding, its admission did not violate petitioner's constitutional rights. The brief presentation of evidence concerning the Aryan Brotherhood "properly focused the jury's attention on [petitioner's] character," and was not offered as an appeal to the jurors' passions or prejudices concerning race, religion, or political affiliation. J.A. 191. Petitioner's membership in the Aryan Brotherhood was

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[2] The jury found the following statutory aggravating circumstances: (1) the murder was committed by an escaped prisoner; (2) the murder was committed during the commission of a burglary or robbery; and (3) the murder was committed for pecuniary gain. J.A. 189 n.27. See Del. Code Ann. tit. 11, § 4209(e)(1)(a), (j), (o).

relevant to his character because it was "indicative of how he wanted to be identified by others" and "was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." *Id.* at 188. Similarly, petitioner's use of the name "Abaddon" "was relevant to his character because it is a reflection of how [petitioner] viewed himself and how he wanted to be viewed, even within hours after Madeline Kisner's murder." *Ibid.* Consequently, the evidence "was necessary to explain [petitioner's] view of himself." *Id.* at 191.

SUMMARY OF ARGUMENT

In *Payne* v. *Tennessee*, No. 90-5721 (June 27, 1991), the Court held that the Constitution does not impose a *per se* rule precluding capital sentencing juries from considering any evidence concerning the victim or the impact of the crime on the victim's family. This case presents a similar question: whether the Constitution imposes a *per se* prohibition against consideration of any of the defendant's beliefs or activities that could not themselves be made the subject of criminal sanctions. In our view, the Constitution creates no such rule.

This Court has held that the Constitution imposes only minimal restrictions on the sentencing authority's freedom to consider a broad range of information in arriving at a just sentence. The freedom to consider a wide spectrum of relevant information at sentencing extends to capital as well as non-capital cases. Indeed, the Court has held that in capital cases it is especially desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

A defendant's attitudes, beliefs, and associations often are highly relevant to the capital sentencing determination. The capital sentencing authority must make an individualized sentencing decision based on the character of the individual and the circumstances of the crime. Membership in an organization—particularly an organization such as a prison gang—can shed light on the defendant's

character and may be relevant to an assessment of the defendant's likely future behavior, whether in prison or in society at large.

Petitioner's argument that a State may not introduce evidence of the defendant's beliefs and associations at sentencing improperly extends the constitutional limitations on criminalizing conduct or beliefs to the very different setting of making evidentiary use of such conduct or beliefs. For example, this Court has held that, although the government may not prosecute a person for advocating the views of the Aryan Brotherhood, it may use the fact of membership in that organization to impeach a witness at trial. Likewise, a capital sentencing authority may consider the fact that the defendant was a member of an organization formed to start a "racial war," even though he could not be prosecuted for joining that organization or advocating its views.

This case is not controlled by the Court's statement that a statutory aggravating factor is constitutionally invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983). The State has not made membership in a prison gang a statutory aggravating factor, *i.e.*, one of the factors that in effect defines the offense of capital murder. Instead, the State has authorized the admission of such evidence, along with a wide range of other non-statutory aggravating and mitigating evidence, only after the jury has determined that the defendant falls within the category of persons eligible for the death penalty. At that stage of the proceeding, the jury is free to consider a host of factors bearing on the defendant's character and likely future behavior to determine whether death is the appropriate sentence.

Petitioner greatly exaggerates the implications of a decision affirming the judgment of the Delaware Supreme Court. State trial and appellate courts can, and do, control the admission of irrelevant or unduly prejudicial evidence in sentencing proceedings as a matter of state law.

And if the evidence in a particular case is so inflammatory and so clearly irrelevant that it renders the proceeding fundamentally unfair, the defendant can assert a constitutional claim under the Due Process Clause.

The admission of evidence concerning petitioner's membership in the Aryan Brotherhood did not violate the Constitution. As the state courts found, that evidence was relevant to petitioner's character and likely future behavior. The presentation of the evidence was brief and not calculated to appeal to the jury's passions or prejudices. Because it provided the jury with a useful source of insight into petitioner's character, it was properly admitted for the jury's consideration at sentencing.

ARGUMENT

THE CONSTITUTION DOES NOT BAR THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S BELIEFS, ATTITUDES, AND ASSOCIATIONS AT THE SENTENCING PHASE OF A CAPITAL TRIAL

A. The Sentencing Authority May Consider A Wide Range Of Factors In Making The Sentencing Decision

Sentencing authorities have traditionally been accorded virtually unlimited freedom to consider a wide range of information in arriving at an appropriate sentence. See *Payne* v. *Tennessee*, No. 90-5721 (June 27, 1991), slip op. 10; *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

In *Williams* v. *New York*, 337 U.S. 241 (1949), the Court upheld the constitutionality of a state policy that encouraged the sentencing authority "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." *Id.* at 245. Justice Black's opinion for the Court in *Williams* distinguished between "[t]ribunals passing on the guilt of a defendant," which "always have been hedged in by strict evidentiary procedural limitations," and sentencing authorities, which have not been so restricted. *Id.* at 246. The Court observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Ibid.* The Court explained that this policy is consistent with the view "that the punishment should fit the offender and not merely the crime." *Id.* at 247. See also *Wasman* v. *United States*, 468 U.S. 559, 563-564 (1984); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969).

The sentencing authority's freedom to consider a wide range of information extends to capital as well as noncapital cases. *Payne* v. *Tennessee*, *supra*; *Williams* v. *New York*, *supra*. It is true that "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for imposing the death penalty. *McCleskey* v. *Kemp*, 481 U.S. 279, 305 (1987). But once the jury finds that a defendant meets that threshold, it "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California* v. *Ramos*, 463 U.S. 992, 1008 (1983). In *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), for example, the Court held that the Constitution does not bar capital sentencing juries from considering expert testimony predicting the defendant's future dangerousness. The Court observed that "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder." *Id.* at 898. And in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the lead opinion concluded that,

"[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 203-204 (opinion of Stewart, Powell, and Stevens, JJ). See also *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.").[3]

B. The Constitution Does Not Erect A *Per Se* Barrier Excluding From A Capital Sentencing Proceeding Relevant Evidence Concerning A Defendant's Beliefs And Activities

Petitioner contends (Br. 17-26) that the Constitution forbids the admission, in a sentencing proceeding, of any evidence concerning beliefs or activities that are protected under the First Amendment. That contention, however, ignores the important distinction between criminalizing conduct that is protected by the First Amendment and considering such conduct, where it is relevant, as a factor in the sentencing determination. Petitioner's proposed rule would "deprive[] the State of the full moral force of its evidence and * * * prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, slip op. 15.[4]

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[3] In *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), the Court held that the Eighth Amendment bars the admission of victim impact evidence during the sentencing phase of a capital trial. *Booth* and *Gathers* represented a departure from the general principle that the Constitution imposes only minimal restrictions on the sentencing authority's freedom to consider a wide range of evidence. In *Payne* v. *Tennessee*, *supra*, the Court reexamined and overruled *Booth* and *Gathers*.

[4] In his petition for certiorari, petitioner advanced a broad contention that "general character evidence is to be offered in mitigation not for aggravation of the offense." Pet. 17. In support of that contention, petitioner relied on this Court's conclusion that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." *Payne*, slip op. 12. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Petitioner appears to have abandoned that broad argument in his brief on the merits. In any event, that argument is refuted by the Court's decision in *Payne* v. *Tennessee*, *supra*. In *Payne*, the Court explained that the statements in *Woodson* and *Eddings* were "not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received." Slip op. 12.

1. *A Defendant's Beliefs And Associations May Be Relevant To The Capital Sentencing Decision*

There is no doubt that a defendant's attitudes, beliefs, and associations may be highly relevant to the capital sentencing decision. Of course, "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence [in sentencing proceedings] is relevant in the first instance." *Skipper* v. *South Carolina*, 476 U.S. 1, 11 (Powell, J., concurring in judgment) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 n.12 (1978) (plurality opinion)). In capital cases, moreover, the Court has held that the sentencing authority is required to consider each defendant as a "uniquely individual human being[]," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and to arrive at "an *individualized* determination on the basis of the character of the individual" as well as "the circumstances of the crime." *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett* v. *Ohio*, 438 U.S. at 601-605 (plurality opinion). The capital sentencing jury's determination "should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry* v. *Lynaugh*, 492 U.S. 302, 304 (1989) (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

As the trial court recognized (J.A. 184), membership in any organization "can be probative of character, at least to some extent." Membership in an organization such as the Aryan Brotherhood is highly probative of character: it suggests the defendant's "lawless nature and rejection of rehabilitation during his incarceration." J.A. 188. Moreover, membership in an organization—particularly a prison gang—is highly relevant to the jury's consideration of the defendant's attitude toward society and his likely future behavior in prison. See *Franklin* v. *Lynaugh*, 487 U.S. 164, 178 (1988) (plurality opinion) (defendant's likely future behavior in prison is relevant to the capital sentencing determination); *United States* v. *Grayson*, 438 U.S. at 51 ("Impressions about the individual being sentenced—[including] * * * the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of 'individualized' sentencing.") (quoting *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974)).

Petitioner does not contend that the evidence at issue in this case lacks probative value as to his character and likely future behavior, or that these factors are irrelevant to the capital sentencing determination. On the contrary, he concedes that "[o]ur beliefs may shed light on our character in all sorts of ways whether we believe in Allah or the Pope, the NAACP or the KKK, an organized religion or atheism, the Black Hebrews or the Aryan Brotherhood." Pet. Br. 23. Petitioner nevertheless argues for a constitutional rule barring the admission of any evidence concerning beliefs or activities if those beliefs or activities could not themselves be made subject to criminal or civil penalties.

2. *The Constitutional Restrictions On Criminalizing Protected Conduct Do Not Apply Where The Evidence Is Relevant To The Guilt or Penalty Phase Of A Criminal Trial*

The Constitution prevents the government from imposing criminal penalties for the expression of provocative ideas unless "the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989) (quoting *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969)). Moreover, the government ordinarily may not impose criminal liability for association with an organization absent proof of "a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy* v. *James*, 408 U.S. 169, 186 (1972). See *Scales* v. *United States*, 367 U.S. 203 (1961). Although the restrictions on the First Amendment rights of prisoners might well justify a prohibition against membership in a group such as the Aryan Brotherhood,[5] we assume for purposes of this case that a prisoner's identification with the group, or at least his act of embracing its views, without more, could not constitutionally be made the subject of prosecution. Thus, we do not quarrel with petitioner's contention that the State could not make it a crime to hold or express racist views, or to express one's affiliation with an organization that espouses such views.[6]

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[5] This Court has recognized that "[t]he fact of confinement and the needs of the penal institution impose limitations on the constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). See generally *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); *Turner* v. *Safley*, 482 U.S. 78 (1987).

[6] Petitioner asserts (Pet. Br. 15) that "[t]he prosecutor did not undertake to show that the Aryan Brotherhood, or whatever group went by that name in any Delaware prison, had committed any unlawful acts." That is not so. The State made a proffer of evidence that the Aryan Brotherhood has illegal aims, including "the control

While a person may not be prosecuted for his beliefs or associations, however, nothing in the Constitution prohibits the State from making evidentiary use of beliefs or associations when they are relevant to a criminal prosecution.

The distinction between criminalizing constitutionally protected conduct and making evidentiary use of such conduct is illustrated by *United States* v. *Abel*, 469 U.S. 45 (1984). In *Abel*, the Court held that the Constitution did not prevent the government from impeaching a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, and that members were sworn to lie for each other. The Court expressly rejected the defendant's argument that cases such as *Scales* and *Brandenburg* require a different result. The Court explained (469 U.S. at 52-53) that

> [t]hose cases dealt with the constitutional requirements for convicting persons under the Smith Act and state syndicalism laws * * *. [M]embership in the Aryan Brotherhood was not offered to convict either [the defendant or the defense witness] of a crime, but to impeach [the witness's] testimony. * * * For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution.

Abel holds that the prosecution may introduce evidence, over a First Amendment challenge, of the defendant's beliefs and his affiliation with the Aryan Brotherhood, where it is relevant to a witness's credibility. The

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of drugs within the prison institutions" and "violent escape attempts," and that "full-fledged" membership in the Aryan Brotherhood (known as "earning your bones") "requires either a murder or an attempted murder of another inmate." J.A. 33, 37. Moreover, the inmates who broke out of prison with petitioner were fellow members of the Aryan Brotherhood. See *id.* at 39 (inmates Nave, Irwin, and McCoy members of Brotherhood).

same principle applies to the admission of similar evidence, over a similar First Amendment challenge, when the evidence is relevant to matters the State has put in issue in a sentencing proceeding, such as the defendant's character and likely future behavior.

In *Barclay* v. *Florida*, 463 U.S. 939 (1983), the defendants were members of a group called the Black Liberation Army. The sentencing judge found that the purpose of the group was "to start a revolution and a racial war." *Id.* at 942. The defendant and other members of the organization killed a hitchhiker in an effort to start the "racial war." The Court did not suggest that defendant's membership in the Black Liberation Army or his racial views were unprotected by the First Amendment. Nevertheless, the Court held that it was proper for the sentencer to consider the defendant's racial animus toward the victim as a factor bearing on the sentencing decision. The plurality explained that "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Id.* at 950. See also *id.* at 970 & n.18 (Stevens, J., concurring in judgment) ("judge's candid exposition of his deeply felt concern about racial crimes * * * does not undermine the legitimacy of the ultimate sentence, * * * because it pertained * * * to the trial judge's exercise of his sentencing discretion.").

This case differs from *Barclay* in that the evidence did not show that petitioner's membership in the Aryan Brotherhood was related to the murder itself. But this Court has recognized that the defendant's character, as well as the circumstances of the crime, can constitutionally be deemed relevant to the sentencing determination, and petitioner's membership in the Aryan Brotherhood unquestionably was relevant to his character and likely future behavior. Accordingly, there is no basis for a constitutional distinction between cases such as *Barclay*, where the evidence is relevant to the circumstances of the

crime, and this case, where the evidence is relevant to other material issues at sentencing.

Barclay and *Abel* refute petitioner's assertion that the Constitution bars the evidentiary use of beliefs and activities that could not themselves be made the subjects of criminal sanctions. As the Pennsylvania Supreme Court noted in response to a similar claim, "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry." *Commonwealth* v. *Abu-Jamal*, 521 Pa. at 215, 555 A.2d at 859.

Petitioner repeatedly relies (Pet. Br. 13, 14, 16, 17, 26) on this Court's suggestion in *Zant* v. *Stephens*, 462 U.S. at 885, that a statutory aggravating factor is constitutionally invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." As examples of constitutionally protected conduct, the Court in *Zant* listed "the display of a red flag, cf. *Stromberg* v. *California*, [283 U.S. 359 (1931)], [or] the expression of unpopular political views, cf. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949)." Contrary to petitioner's assertions, those statements in *Zant* do not control this case.

As noted above, this Court has identified two distinct phases of the capital sentencing process. The initial phase establishes "a required threshold below which the death penalty cannot be imposed." *McCleskey* v. *Kemp*, 481 U.S. 279, 305 (1987). At that stage, the State must establish "rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Ibid.* Thus, the selection of statutory aggravating factors in effect defines the offense of capital murder. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, however, "the jury * * * is free to consider a myriad of

factors to determine whether death is the appropriate punishment." *California* v. *Ramos*, 463 U.S. 992, 1008 (1983).

Delaware has not made membership in a racist gang a statutory aggravating factor that qualifies a defendant for the death penalty. Thus, Delaware has not made "constitutionally protected conduct an aggravating circumstance, thereby 'elevating' a crime to the status of a capital offense on the basis of impermissible factors." *Commonwealth* v. *Abu-Jamal*, 521 Pa. at 215, 555 A.2d at 859. It is only at the final stage of the capital sentencing proceeding, where the jury must weigh a "myriad" of non-statutory mitigating and aggravating evidence, that evidence such as petitioner's gang membership may be considered in aggravation. That approach to the reasoned, moral judgment required of a capital sentencing authority does not offend the Constitution.

To be sure, the jury's consideration of a defendant's constitutionally protected beliefs or associations could conceivably be the factor that tips the balance in favor of the death penalty. But the same could be true of any number of other factors that could not in themselves subject the defendant to prosecution or qualify him for the death penalty. Suppose, for example, that a defendant wrote an essay expressing his belief that all prison guards deserve to be murdered by the inmates. The State could not make it a crime to hold or express such an opinion, absent a clear and present danger of inciting prison violence. But it strains common sense to assert that a sentencing authority could not consider the essay as some evidence of the defendant's character and future dangerousness. To take another example, a person may not be prosecuted for expressing contempt for others, but where the defendant expresses contempt for his victim and the victim's family members, rather than remorse, the defendant's attitude may surely be taken into account at sentencing. Likewise, a person may not be prosecuted for expressing admiration for, and a desire to emulate,

a particularly violent killer, but such expressions are surely within the competence of a sentencing hearing at which the defendant's character is in issue.

The same analysis is applicable to consideration of the defendant's prior record. For example, a prior conviction of rape might be the factor that persuades the jury that the defendant's record is so bad that he should be sentenced to death. That would be permissible, even though the Court has held that imposition of the death penalty as the punishment for the crime of rape would be unconstitutional. See *Coker* v. *Georgia*, 433 U.S. 584 (1977). The same analysis would apply even if it turned out that a single shoplifting conviction tipped the balance in a close case in favor of the death penalty for a defendant convicted of murder. That is so because, even though it could be said that the death penalty was imposed "as a result of" the shoplifting conviction, it was not imposed "for" the offense of shoplifting, but for the murder. Likewise, although it is conceivable that the defendant in *Abel* was convicted because the government successfully impeached the defendant's witness by showing that he and the defendant were both members of the Aryan Brotherhood, the defendant was not convicted "for" belonging to the Aryan Brotherhood. Under the same reasoning, it is clear that the death penalty in this case was not imposed "for" petitioner's membership in the Aryan Brotherhood, but for murder.

C. A *Per Se* Rule Would Distort The Sentencing Process And Would Be Difficult To Apply

This Court has held that a sentencer in a capital case may not be prevented from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death. *Penry* v. *Lynaugh*, 492 U.S. 302, 317 (1989); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). For example, the defendant may present evidence that he is devoutly religious, see *Franklin* v. *Lynaugh*, 487 U.S.

164, 186 (1988) (O'Connor, J., concurring in the judgment) ("Evidence of * * * religious devotion might demonstrate positive character traits that might mitigate against the death penalty."); *id.* at 190 (Stevens, J., dissenting) ("Evidence of * * * regular church attendance" is relevant to character). In light of the defendant's unrestricted right to present mitigating evidence, a rule of the sort that petitioner urges, which would forbid the prosecution from presenting any evidence concerning the defendant's protected activities or beliefs, would distort the presentation of evidence to sentencing juries and undermine the rationality of their sentencing determinations.

If only the defendant could introduce evidence of his beliefs and associations, the jury would often receive an incomplete and unbalanced account of the defendant's character. In *Payne*, the Court rejected a similar rule excluding victim impact evidence, observing that "justice, though due to the accused, is due to the accuser also." Slip op. 17 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)). Indeed, if petitioner's First Amendment rule were adopted, it would cast doubt on the constitutionality of the principle that defendants are free to proffer any relevant mitigating evidence and in effect may be given "credit" by the sentencing authority for joining organizations and embracing beliefs that the sentencing authority considers to be worthy. If the First Amendment forbids "penalizing" defendants for antisocial beliefs by permitting the State to introduce evidence of those beliefs at sentencing, it must also forbid selectively "rewarding" defendants who hold views that are widely admired, thereby effectively penalizing those defendants who do not. See *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990) (promotions based on political affiliation impermissibly infringe public employees' First Amendment rights).

Even if the First Amendment rule proposed by petitioner could be limited to evidence offered by the prosecution, problems of application would still make that rule

unmanageable. It is undisputed that the prosecution is entitled to rebut the defendant's mitigating evidence, even if it concerns beliefs or activities that could not be made subject to criminal sanctions. See *Payne* v. *Tennessee*, slip op. 4-5 (Stevens, J., dissenting) ("Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence."). Petitioner appears to concede as much. See Pet. 20-21 ("If the defendant has offered 'character' evidence to the effect that he was a life-long member of the NAACP * * * and believed in their goals, evidence of an actual association with an organization with established antithetical goals, conceivably may have been proper rebuttal."). Yet, there is no persuasive reason to draw a constitutional line between evidence introduced in rebuttal and evidence introduced by the prosecution in the first instance.

The sentencing authority's freedom to consider a wide spectrum of relevant evidence has never turned on whether the defendant agrees to allow the sentencer to consider such evidence. Moreover, the distinction between rebuttal and non-rebuttal evidence is far from clear. As petitioner's own example demonstrates, the prosecution could rebut evidence that petitioner was a life-long member of the NAACP by showing either that petitioner did not in fact belong to the NAACP, or that he belonged to an organization with inconsistent goals, such as the Aryan Brotherhood. In this case, petitioner adduced evidence that he had attended meetings of Alcoholics Anonymous in prison. That evidence was relevant not only to the narrow issue whether petitioner was making a sincere effort to overcome his alcohol and drug problems, but also to the broader issue of petitioner's likely future behavior as a prisoner and to his overall attitude toward his role in society. The State's evidence that petitioner belonged to the Aryan Brotherhood rebutted petitioner's broader suggestion that he was making constructive use of his time in prison and viewed it as important to

address problems that may have been associated with his life in crime.[7]

Petitioner's proposed rule, like the rule rejected in *Payne*, would also create an unworkable standard of constitutional relevance. The range of speech and expressive conduct subject to protection under the First Amendment is quite broad. Questions inevitably would arise as to whether various types of evidence or prosecutorial argument risk imposing the death sentence "because of" the deefndant's exercise of his First Amendment rights. Cf. *South Carolina* v. *Gathers*, 490 U.S. at 813 (O'Connor, J., dissenting). In addition, confusion would arise where factual details that would be inadmissible under petitioner's *per se* rule were disclosed during the guilt phase of the trial. See *Payne* v. *Tennessee*, slip op. 6 (Souter, J., concurring).

Some of the acts at issue in this case provide a good illustration of the sort of confusion that petitioner's proposed rule would engender. A question would arise, for example, whether petitioner's act of painting a swastika on his cell wall could be introduced only to show a willingness to deface prison property, and not to suggest adherence to neo-Nazi beliefs, or even to suggest a more

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[7] The unworkable nature of petitioner's proposed distinction between rebuttal use and other uses of evidence of a defendant's associaitons and beliefs can be illustrated by the following example: Suppose state law created a rebuttable presumption that capital defendants are of good character and likely to be model prisoners. Consistent with petitioner's "rebuttal" theory, the State would apparently be free to rebut that presumption, just as it is free to rebut mitigating evidence introduced by the defendant. And if a State can admit evidence of the sort at issue in this case to rebut a presumption of good character, it should be equally free to admit such evidence to ensure that the jury will not assume, based on the absence of evidence to the contrary, that the defendant's adjustment to prison has been satisfactory. Even if a distinction such as petitioner proposes could be made workable as a matter of state evidentiary law, there is nothing in the Constitution that suggests that the distinction must be maintained as a matter of constitutional compulsion.

general attitude of defiance toward prison authorities. Another question could arise whether, for example, the State could offer evidence that petitioner chose to associate with a particularly violent and disruptive group of inmates in the prison, but could not introduce evidence that petitioner and those inmates shared the belief that violence in prison was appropriate. In sum, adoption of petitioner's position would ensure that questions of First Amendment protection would arise in virtually every case in which a State sought to offer evidence of the defendant's statements or associations in an effort to prove his character for purposes of a capital sentencing proceeding.

D. The Absence of a *Per Se* Rule Barring Admission of Evidence Concerning Beliefs and Associations Does Not Imply That Such Evidence Is Always Admissible

Petitioner asserts (Pet. Br. 23-24) that if the judgment in this case is affirmed, prosecutors will be free to argue that defendants should receive the death penalty because they support unpopular political figures or causes, hold unpopular religious views, or engage in unpopular forms of political expression such as flag-burning. Those concerns are exaggerated and can be dealt with by means other than a *per se* constitutional rule barring all evidence of beliefs and associations.

First, factors such as the defendant's race, nationality, political affiliation, and religious beliefs and activities are ordinarily deemed irrelevant to the sentencing determination and are excluded from consideration on that ground. See *Zant* v. *Stephens*, 462 U.S. at 885; *United States* v. *Bakker*, 925 F.2d 728, 740 (4th Cir. 1991); *United States* v. *Bangert*, 645 F.2d 1297, 1308 (8th Cir. 1981). Other factors, including evidence of the defendant's statements or his membership in particular organizations, may be subject to exclusion on the ground that their prejudicial impact outweighs their probative value. In this case, for example, the trial court weighed the prejudicial impact of the State's evidence against its probative value, and ruled

that it would exclude some of the State's evidence. See J.A. 25, 58, 186. When the trial court does not exclude the evidence, it may give the jury a limiting instruction, guiding the jury in its use of the evidence. And, of course, defense counsel is free to argue that the jury should give little or no weight to the prosecution's evidence.

Second, the absence of a *per se* constitutional rule barring admission of any aggravating evidence concerning the defendant's associations and beliefs does not imply that the admission of such evidence could never violate the Constitution. While some beliefs and associations can fairly be said to reflect criminal propensity, a court must exclude evidence of beliefs and associations that do not reflect bad character, but are merely unpopular in the community. The admission of such evidence that prejudices the defendant and is clearly irrelevant to a proper sentencing determination may render the sentencing proceeding fundamentally unfair, in which case the defendant may pursue a claim under the Due Process Clause. See *Payne*, slip op. 15; *Darden* v. *Wainwright*, 477 U.S. 168, 179-183 (1986); *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980).

The fact that it is sometimes difficult to draw a distinction between beliefs and associations that reflect bad character and those that are merely unpopular does not justify the creation of a constitutional rule barring the admission of all such evidence. Nor is the risk of jury misuse of such evidence sufficiently grave as to require that the jury be deprived of the evidence even when it may be of great value in making the sentencing decision. In capital cases, juries must make a moral judgment based in significant part on the character of the defendant. Inevitably, there is some risk that a jury confronted with this complex and demanding task will consider irrelevant factors, or will allow passion or prejudice to supplant a reasoned moral judgment. But just as that risk does not bar the prosecution from offering "a glimpse of the life"

which the defendant "chose to extinguish," *Payne*, slip op. 12, so too it does not bar the prosecution from offering the jury a glimpse of the character of the defendant, whose life the jury has in its hands.

E. The Evidence And Argument At Issue In This Case Did Not Violate Petitioner's Constitutional Rights

The Constitution does not require exclusion of the evidence at issue in this case. Besides being relevant to his character and likely future behavior, the State's evidence was presented in a brief and noninflammatory fashion.

Petitioner does not contend that he used the name "Abaddon" in connection with any religious belief or practice. Petitioner's references to himself as "Abaddon" were in effect statements that he regarded himself, and wished others to regard him, as an evil man. The Constitution does not shield a defendant against the State's use of such self-revelatory statements at the sentencing phase of a criminal trial.

The admission of the Aryan Brotherhood evidence was also constitutional. Even assuming that petitioner properly preserved his objections to the admission of that evidence,[8] the evidence was highly relevant to petitioner's character and likely future behavior in prison. As the Delaware Supreme Court explained, petitioner's "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but * * * was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." J.A. 188. The State's brief, noninflammatory presentation of that probative evidence regarding petitioner's character did not violate the Constitution.

[8] Petitioner agreed to the admission of a brief stipulation concerning the Aryan Brotherhood in order to prevent the jury from hearing an expert witness's detailed testimony concerning that organization. Petitioner is now seeking to repudiate that agreement. In the Delaware Supreme Court, petitioner argued that he "was 'forced' to enter the stipulation in order to guarantee that a relatively 'sterile' description of the Aryan Brotherhood would be presented to the jury." J.A. 185. But petitioner, like all defendants, had the option of preserving his objections for appeal. Instead, he entered into a compromise agreement with the prosecution in hopes of improving his chances at trial. It is true that the Delaware Supreme Court considered and rejected petitioner's constitutional argument on the merits. But the Delaware court did not hold that petitioner had preserved his constitutional objection, and we think it doubtful that he did.

CONCLUSION

The judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted.

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